I now turn to consider whether the will made by Lee Kim Chye on the 15th day of March, 1923 was revoked by his marriage with the plaintiff on the 9th day of November, 1925.

In the case of *re Shaik Abubakar bin Mohamed Lajam, deceased,* [1935] M.L.J. 137 the learned Chief Justice in 1924 held that section 13 of Ordinance No. 13 (Wills), applies to marriages of Mohamedans: that is, that the operation of that section is not confined to monogamous marriages and that in the case of Mohamedans, a will is revoked by a polygamous marriage.

Counsel for the plaintiff states from the Bar that this decision has never been questioned and has frequently been acted upon during the last 11 years.

That decision does not bind me, but it is entitled to very great respect and I should feel that I ought to follow it unless I were convinced that it is incorrect: I am not convinced that it is incorrect.

But counsel for the defendant seeks to distinguish it: he argues that as section 13 of Ordinance No. 3 (Wills) is based on section 18 of the English Wills Act, 1837, it can only apply to a marriage which has this characteristic of an English marriage, that it can be dated; in other words, it can only apply to a marriage which can be proved to have taken place on a certain date; it cannot apply to a marriage presumed from cohabitation and repute, because such a marriage cannot be proved to have taken place on a certain date: if applicable at all, it must be applied to all Chinese secondary marriages, and if a Chinese makes a number of secondary marriages, none of which can be proved to have taken place on a definite date, the result of applying this section will be to create a situation which is unreasonable and unworkable; the Court ought to construe the law reasonably and workably, and that necessitates the decision that section 13 is not applicable to Chinese secondary marriages.

I find myself unable to accept that argument. Counsel has not given reasons to satisfy me that any characteristic of an English marriage is to be implied in the use of the word "marriage" in section 13: one of the most important characteristics, — if it is not the most important characteristic, — of an English marriage, namely, that it is monogamous, is not to be [66] implied in the use [66] of the word, and I can see no reason why a less important characteristic, namely that it can be dated, is to be implied: moreover, in England a marriage may be presumed from cohabitation and repute, and the Courts have laid down the principle on which the date is to be determined, namely, on the earliest date on which a marriage can be presumed (*cf. Re Haynes: Haynes* v. *Carter,* 94 *Law Times* Reports, p. 431): no doubt difficulties may arise when several secondary marriages are presumed from cohabitation and repute, but in practice it will nearly always be possible to frame the issue in such a way that the question will be whether the Court can presume the marriage to have taken place before a certain date, and that question can be determined in the same way as any other question of fact; if the issue cannot be so framed, for instance when there are several wills and several secondary marriages, and it is difficult to date any of them then if the Court cannot determine the dates, the litigant will fail who is liable to discharge the burden of proof. I do not say that this is satisfactory, but it does not create a situation which is unworkable: it is only when a statutory provision may equally well be construed in two ways, one reasonable and the other unreasonable, that the Court will adopt the construction that is reasonable: if a statutory provision is clear (and if I follow *Shaik Abubakar's* case, I must hold that "marriage" in section 13 clearly includes polygamous marriages), the question whether it is reasonable or not, does not fall within the purview of the Court. Accordingly, I hold that section 13 of Ordinance No. 3 (Wills) is applicable to a Chinese secondary marriage and consequently that the will made by Lee Kim Chye on the 15th day of March, 1923 was revoked by his marriage with the plaintiff on the 9th day of November, 1925. In my judgment, the issues set out at the commencement hereof are to be determined as follows:—

Issue (1): Yes.
Issue (2): Yes.
Issue (3): Yes.

Order ccordingly.

Solicitors: *Braddell Bros.; Chan & Eber.*

REX v. VINCENT BANKA & ANOR.

[C.C.A. (Huggard C.J., Whitley and Terrell JJ.) January 11, 1936]
[Criminal Appeal No. 5 of 1935]

Penal Code, s.34 — Common intention.

Before the jury can find an accused person guilty of murder by reason of the provisions of section 34 of the Penal Code, they must be satisfied on the evidence that there existed between the participants a common intention not only to rob but also to kill the deceased. The trial Judge should direct the jury to this effect.

The Emperor v. *Nga Aung Thein,* A.I.R. 1935 Rang. 89 and *Barendra Kumar Ghose* v. *The King-Emperor,* 52 I.A. 41 followed.

Appeal against conviction for murder. The appeal came on for hearing before Huggard C.J., Whitley and Terrell JJ. and at the conclusion of the hearing the Court reserved judgment.

Mallal for the 1st accused.

Davies for the 2nd accused.

Worley (Deputy Public Prosecutor) for the Crown.

The facts and arguments sufficiently appear from the judgment.

On the 11th of January 1936 the Court delivered an oral judgment allowing the appeal and quashing the conviction and intimated that they would give their reasons in writing later. The judgment of the Court was delivered by —

Huggard C.J.: The appellants were jointly charged at the November Assizes at Singapore with (1) murder, and (2) committing robbery in the course of which hurt was caused. They were convicted on both charges and were each sentenced to death in respect of the first charge and to seven years' rigorous imprisonment in respect of the second charge.

The first five grounds upon which the appellants have appealed are as follows:

(1) The learned Judge failed to direct the jury that the charges against the accused had to be established by the prosecution beyond a reasonable doubt apart from the evidence of the accused and such failure amounted to misdirection.

(2) The learned Judge failed to direct the jury that it was for them to decide if the evidence given by the accused was true and that if they thought that reasonably it might be true they ought to acquit. On the contrary, the learned Judge inferentially directed the jury that the evidence of the accused was not worthy of credit in those particulars where it was not corroborated by the witnesses for the prosecution.

(3) The learned Judge failed to direct the jury that they were the sole Judges of fact and they must form their own opinion after a consideration of facts and circumstances independently of the opinion expressed by him. Such failure amounted to misdirection:

(4) The learned Judge, although he warned the jury as to the danger of accepting the uncorroborated evidence of accomplices, failed to draw the attention of the jury as to which witnesses for the prosecution were accomplices and which not.

(5) The learned Judge failed to properly explain to the jury the law as applicable to the facts of the case.

[67] [67] It is apparent from the general terms of the first four of these grounds of appeal that they are intended to apply to the convictions for robbery as well as to the convictions for murder, but at the hearing of the appeal counsel for the appellants intimated that they did not propose to attack the convictions for robbery, but only the convictions for murder. It seems obvious, however, from an examination of the first four grounds of appeal, that if they have any substance at all they must affect equally the convictions on both charges, so that their abandonment as regards the convictions for robbery would seem, in effect, to amount to an abandonment as regards the convictions for murder also. But however that may be it is sufficient to say that in the opinion of the Court none of these first four grounds can be supported. In our view, on the matters raised in those grounds, the summing-up of the learned trial Judge was entirely adequate, particularly when it is considered in conjunction with the speeches of counsel which immediately preceded it.

The fifth ground of appeal set out above was not argued before this Court, except so far as it may have been covered by the argument upon the sixth ground of appeal.

The sixth and last grounds of appeal advanced by the first appellant, Vincent Banka reads as follows:—

(6) In any case, the learned Judge misdirected the jury as to the proper construction of section 34 of the Penal Code and failed to direct the jury that they should convict accused No. 1 of the offence of murder only if they were satisfied either:—

(a) that accused No. 1 inflicted the wounds which resulted in the death of Chhua Jin Sui or,

(b) that there was an intention common to both the accused to cause the death of Chhua Jin Sui and one of the accused caused such death.

A similar ground of appeal was advanced by the second appellant, Sim Teng Koh and reads as follows:—

(5) In any case, the learned Judge misdirected the jury as to the proper construction of section 34 of the Penal Code and failed to direct the jury that they should convict accused No. 2 of the offence of murder only if they were satisfied either:—

(a) that accused No. 2 inflicted the wounds which resulted in the death of Chhua Jin Sui, or

(b) that there was an intention common to both the accused to cause the death of Chhua Jin Sui and one of the accused caused such death.

In order properly to understand this ground of appeal it is necessary to set out briefly the facts of the case as presented in the Court below. The two accused were charged with committing robbery upon a man named Chhua Jin Sui. In the course of the robbery a stab wound, which subsequently proved fatal, was inflicted upon Chhua Jin Sui by one of the two accused. It was obvious therefore that one of the two accused had carried a knife. The evidence, however, given on behalf of the prosecution as to which of the two accused carried or used a knife and inflicted this fatal wound was quite inconclusive; there was no evidence of any express agreement between the two men that a knife should be carried or that the victim should be stabbed; and when the accused went into the witness box each of them in turn alleged that it was the other who had been in possession of and had used the knife. But at this point their evidence differed. The first accused, Vincent Banka, denied that he knew that the second accused, Teng Koh, had a knife and said that he was frightened when he saw it, while Teng Koh said that before the robbery took place a witness, Kitt Ling, produced two knives and that one of these was taken by Vincent Banka and that this was the knife with which the deceased was stabbed.

In these circumstances the proposition put forward by the prosecution was that inasmuch as the fatal wound was inflicted in carrying out a common intention on the part of both accused to rob the deceased — in other words, a common intention to commit a crime involving violence — it was immaterial which of the two had inflicted the wound, and that by virtue of section 34 of the Penal Code both the accused were equally guilty of murder.

Section 34 of the Penal Code, upon which this proposition was based, reads as follows:—

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

The corresponding section of the Indian Penal Code, which is identical in terms with our section 34, has been the subject of discussion in a large number of cases in India and Burma. It is unnecessary here to examine all those cases. The more important of them were considered in the recent case of *The Emperor* v. *Nga Aung Thein and another* which came before the Full Bench of Rangoon in January, 1935, and is reported in the *All India Reporter* (Rangoon) for March, 1935, at p. 89. In that case the following question was propounded for the opinion of the Court:—

"When less than five people go out armed to commit robbery without any pre-arranged intention to commit murder, but in the course of the robbery one of the robbers does commit murder, are all the [68] robbers liable to be convicted under section 302, read with section 34 of the Indian Penal Code, when there is no evidence to show that they committed any further act which would render them directly liable as abettors?" [68]

The Full Bench answered this question by saying, in effect, that no hard and fast rule could be laid down, as the question as to the existence of a common intention is a question of fact to be determined on a consideration of the facts in each case.

The following extracts from the judgments of the Full Bench may usefully be quoted. At page 90 of the report Page C.J. says:—

"Whether or not a criminal act is done by several persons in furtherance of the common intention of all, is a question of fact to be determined on a consideration of the facts in each case, and the common intention may be inferred from the circumstances disclosed in the evidence, and need not be the subject of an express agreement between the persons concerned. The words 'without any pre-arranged intention to commit murder' in the question that has been referred are ambiguous, but it is enough to say with respect to these words that if the persons by whom the criminal act was done had expressly agreed beforehand that they would endeavour to commit the offence, that, no doubt, would be cogent evidence that the act, if committed, was done in furtherance of the common intention of the conspirators. But the question is one of fact that turns upon the circumstances disclosed in the evidence in the particular case under consideration."

Then at page 91 of the report the learned Chief Justice indicates that in his opinion no *presumtio facti* or *juris* can arise as to the existence of a common intention — "the question of fact depending not upon a legal presumption, but upon the inference that the Court draws from the evidence adduced at the trial." And on the same page the learned Chief Justice quotes with approval the following observations of Richardson J. in *The Emperor* v. *Barendra Kumar Ghose* A.I.R. 1924 Cal. at p. 298:—

"A common intention to carry out an unlawful design at all costs, even at the cost of overcoming resistance, or evading capture by taking life, is sufficient. Without mincing matters the presumption of a common intention to add murder, if necessary, to robbery, is not easily avoided, where all, or some to the knowledge of the rest, of those engaged in the enterprise, are proved to have carried fire-arms, and fire-arms have been used with fatal effect."

In the same Rangoon case Baguley J. says at page 91 of the report:—

"The answer to the question as drafted, as I now recognise is, that no direct and unqualified answer can be given. There is no presumption that can be, and has got to be made; each case has got to be judged on the facts proved and the inferences that the Court draws from those facts, remembering always that if sufficient facts have not been proved to warrant a deduction unfavourable to the accused the benefit of the absence of any such deduction must be given to the accused. The leading case on the point is without doubt the Privy Council ruling in *Barendra Kumar Ghose* v. *The King-Emperor,* 52 Indian Appeals, p. 41. The crux of the decision is the finding that the passage in the charge to the jury: 'If you come to the conclusion that these three or four persons came into the post office with that intention of robbery and, if necessary to kill, and death resulted from their act, if that be so, you are bound to find a verdict of guilty.' was correct.

This being the case it seems that the condition precedent suggested in the question, namely, a pre-arranged intention to commit murder, a pre-arrangement which from the nature of things in the vast majority of cases it would be absolutely impossible to prove, is not essential for the finding of guilty of murder under section 302, Penal Code, read with section 34, Penal Code against all the robbers. For a finding of guilty under these two sections read together it is sufficient if the Court is of opinion that from all the facts proved, the way in which the robbery is carried out, the weapons with which the robbers were armed, and their knowledge of the way in which their fellow robbers were armed, the characters of the robbers themselves, and so on, a legitimate inference can be drawn that the robbers went out 'to commit robbery and, if necessary, to kill,' and that death resulted in consequence of what they, as a band, did."

And the learned Judge, at page 92 of the report, answers the question propounded in the following terms:—

"Under the circumstances mentioned in the question, if from the evidence as a whole, and all the surrounding circumstances of the case, the Court is of opinion that a legitimate deduction may be made that at the time the robbery occurred the band of robbers, or any of them, had formed the intention of committing robbery, and, if necessary, of killing in order [69] to carry out the robbery successfully, each and all of the robbers who had formed that common intention are liable to be convicted under section 302, Indian Penal Code, read with section 34 of the same Code." [69]

In the course of the arguments on this appeal this Court was referred to a number of English cases where the question of "common intent" or "common design" has been considered. The more important of these cases were: *R.* v. *Jackson and another,* 7 Cox C.C. 357; *R.* v. *Harrington,* 5 Cox C.C. 231; *R.* v. *Bridmore,* 6 Cr. A.R. 195; *R.* v. *Short,* 23 Cr. A.R. 170; *R.* v. *Betts and Ridley,* 22 Cr. A.R. 128.

In considering these English cases, however, it is necessary to remember that there is a very important difference between the law as enacted in section 34 of our Penal Code and the Common Law of England as to the evidence necessary to establish a common intention. Under our Code it is essential, that there should be evidence of a common intention, or evidence from which such a comomn intention can properly be inferred, *to commit the act actually committed.* In England that is not essential. The result of the English decided cases on this question is summed up in *Halsbury's* Laws of England (Second Edition), Vol. IX, at p. 435, as follows:—

"Where several persons are engaged in a common design and another person is killed, whether intentionally or unintentionally, by an act of one of them done in prosecution of the common design, the others present are guilty of murder, if the common design was to commit murder, or to inflict felonious violence, or to commit any breach of the peace and violently to resist all opposers."

It is clear from this summary that the decisions in England have gone further than decisions in India or in this Colony, under the more restricted provisions of section 34 of the Penal Code, could possibly go. Obviously, therefore, authoritative decisions of the Courts of India and of Burma are a safer guide for the Courts of this Colony to follow in dealing with cases in which this difficult question of "common intention" arises.

This Court finds itself in complete agreement with the observations of the Full Bench of Rangoon which are quoted above; and, applying those observations to the circumstances obtaining in this Colony, it follows that it is the duty of the trial Judge, in cases where section 34 of the Penal Code is relied on, to direct the attention of the jury to any evidence from which they may legitimately infer the existence of a common intention to commit the criminal act actually committed; at the same time making it clear that the question whether or not such common intention existed is a question of fact and is for them to determine.

We turn now to that part of the summing-up of the learned trial Judge in the present case in which he deals with section 34 of the Penal Code. After reading the section to the jury the learned Judge referred to the case of *Ghose* v. *The King-Emperor* which went to the Privy Council and is reported in L.R. 52 Indian Appeals, 40, and also in 41 T.L.R., 27, and he read out to the jury the headnote which appears in the latter Report and which is as follows:—

"The appellant was one of several men who went to a Post Office in Bengal and called on the sub-postmaster to give up the money. They fired pistols at the sub-postmaster and he died at once. The appellant, who had fired his pistol many times, was secured, but the others escaped. The appellant was charged with murder, and the Judge directed the jury upon the footing that the appellant might be the man who fired the fatal shot and that, if the jury were satisfied that the sub-postmaster was killed in furtherance of the common intent of all, the appellant was guilty of murder whether he fired the fatal shot or not. The jury convicted the appellant."

The learned Judge then proceeded as follows:—

"In that case the learned trial Judge directed the jury that the prisoner was one of the men inside the room and one of those who fired, and might be the man who fired the fatal shot, and that in any event if they were satisfied (in terms of section 34 of the Code) that the postmaster was killed in furtherance of the common intent of all, then the prisoner was guilty of murder whether he fired the fatal shot or not. At the end of the judgment the Privy Council said that: 'The learned Judge's direction was not erroneous in point of law, and it sufficiently dealt with the material facts. It therefore contained no misdirection.'

I would propose to paraphrase section 34 as follows: Where there is unity of criminal behaviour among several persons in the furtherance of a common intention which results in something being done by one of these persons for which that one would be punished, then all who so took part in the criminal behaviour are responsible for the act of that one individual."

The learned trial Judge then proceeded to deal with the evidence which concerned the question whether the accused were the two men who had committed the robbery; in other words, whether their [70] identity as the robbers had been [70] satisfactorily established. But nowhere in his summing-up did the learned Judge direct the jury that, even if they were satisfied as to the identity of the two robbers, before they could find the accused guilty of murder by reason of the provisions of section 34 of the Code they must be satisfied on the evidence that there existed between the two men a common intention not only to rob but also, if necessary, to kill the deceased. It appears to us from a careful perusal of the summing-up in this case that the impression left on the minds of the jury must inevitably have been that if they were satisfied that it was the two accused who committed the robbery, then, on the authority of *Ghose's* case (where, of course, the facts were entirely different), they should find them guilty of murder also. The learned Judge said towards the close of his summing-up:—

"The whole crux of this case is what happened on the Silat Road near the Sikh temple."

That, of course, is true only as regards the robbery. The learned Judge should have told the jury, in effect, that they had first to be satisfied as to the identity of the robbers; that then, if so satisfied, they had to consider the further question whether on the evidence placed before them they were satisfied as to the existence of a common intention between the robbers not merely to commit robbery but, if necessary, to kill the deceased; that for the purpose of coming to a decision they must consider the evidence against each of the accused separately; and that they could not properly convict either of the accused of murder by reason of section 34 of the Code unless they were satisfied that this common intention existed. But the evidence from which any sort of common intention could legitimately be inferred in the present case was never put to the jury at all, and the impression that they never considered the question of common intention as a distinct issue, or the cases of the two accused separately, appears to derive some support from the fact that the jury deliberated for only ten minutes before returning a verdict of guilty on both charges against each accused.

In our opinion the omission to direct the jury on the lines indicated above constitutes a fatal defect in an otherwise unexceptionable summing-up. It would, of course, be quite unsafe to assume that the jury, if correctly directed, would have arrived at the same conclusion, and accordingly this Court has no option but to quash the convictions for murder. The convictions and sentences for robbery will stand.

We think it desirable to add a few words regarding the learned trial Judge's paraphrase of section 34 of the Code which has already been quoted in this judgment but which, for convenience, may here be set out again. It is as follows:—

"I would propose to paraphrase section 34 as follows: Where there is unity of criminal behaviour among several persons in the furtherance of a common intention which results in something being done by one of those persons for which that one would be punished, then all who so took part in the criminal behaviour are responsible for the act of that one individual."

If this is intended to be in the nature of a proposition of general application, then in the view of this Court it is much too wide. It may find some measure of support in the English decisions based on common law which were cited to us, but it cannot be supported in such general terms by any decision which has been given under the express and more restricted terms of section 34 of the Penal Code. Under the terms of that section, as has already been pointed out, there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to "behave criminally." We would add further that, as indicated in the Rangoon case already referred to, it is impossible to lay down a general proposition of law which could be applied to all cases, since the existence of a common intention must be a question of fact to be determined upon the evidence in each individual case.

Finally we would observe that this case appears to furnish another illustration of the danger which may arise from taking propositions of law which have been laid down in relation to the facts of a particular case and applying them without qualification to another case where the facts are not identical.

Appeal allowed.

Solicitors: *Mallal & Namazie.*